STATE OF MICHIGAN

IN THE SUPREME COURT

WILLIAM FRANK WARD,

Plaintiff-Appellee,

vs.

CONSOLIDATED RAIL CORPORATION, d/b/a Conrail, a Pennsylvania corporation,

Defendant-Appellant.

Supreme Court No: 124533

Court of Appeals No: 234619

Lower Court No: 99-903048-NI

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124533

PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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STATEMENT REGARDING JURISDICTION

Plaintiff-Appellee concurs with Defendant-Appellant's statement as to jurisdiction, with the exception of the use of the term "... awarding plaintiff attorney fees ...." . In fact, what both the trial judge and the appellate panel awarded and affirmed were mediation sanctions involving costs under MCR 2.403.

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STATEMENT OF QUESTIONS PRESENTED

I. WAS THE TRIAL COURT CORRECT IN RULING THAT, BECAUSE CONRAIL HAD DESTROYED THE HANDBRAKE AT ISSUE, WARD WAS ENTITLED BEFORE TRIAL TO A PRESUMPTION AND, AT THE CONCLUSION OF TRIAL, TO THE EXTENT SOME REBUTTAL EVIDENCE WAS PROFFERED, A PERMISSIBLE INFERENCE THAT IT WAS DEFECTIVE?

The Trial Court Answered "YES" .

The Court of Appeals Answered "YES" .

Plaintiff-Appellee Answers "YES" .

A. UNDER MICHIGAN LAW, WAS WARD PROPERLY ENTITLED TO A PRETRIAL PRESUMPTION THAT IF THE EVIDENCE WERE PRODUCED AT TRIAL, IT WOULD OPERATE AGAINST THE PARTY WHO DELIBERATELY DESTROYED IT, AS THE TRIAL COURT CONCLUDED?

The Trial Court Answered "YES" .

The Court of Appeals Answered "YES" .

Plaintiff-Appellee Answers "YES".

B. WAS THE JURY PROPERLY INSTRUCTED CONSISTENT WITH SJI 2(d) 6.01(c)?

The Trial Court Answered "YES" .

The Court of Appeals Answered "YES" .

Plaintiff-Appellee Answers "YES" .

C. WAS IT CONSISTENT WITH SUBSTANTIAL JUSTICE FOR THE TRIAL COURT TO INSTRUCT THE JURY THAT IT WAS ALLOWED TO INFER THAT THE DESTROYED EVIDENCE WAS UNFAVORABLE TO CONRAIL?

The Trial Court Answered "YES".

The Court of Appeals Answered "YES".

Plaintiff-Appellee Answers "YES".

II. WERE THE FINDINGS BY THE TRIER OF FACT CONSISTENT, AND THE TRIAL COURT'S FAILURE TO OVERTURN THE VERDICT OR GRANT A NEW TRIAL A PROPER EXERCISE OF DISCRETION?

The Trial Court Answered "YES".

The Court of Appeals Answered "YES".

Plaintiff-Appellee Answers "YES".

A. ARE THE EVIDENCE OR JURY FINDINGS ON A NEGLIGENCE THEORY IRRELEVANT AND DO NOT RELIEVE CONRAIL OF ITS ABSOLUTE LIABILITY FOR INJURIES CAUSED, IN WHOLE OR IN PART, BY A VIOLATION OF THE FEDERAL SAFETY APPLIANCE ACT?

The Trial Court Answered "YES".

The Court of Appeals Answered "YES".

Plaintiff-Appellee Answers "YES".

B. WAS THE JURY'S DETERMINATION THAT CONRAIL VIOLATED THE FEDERAL SAFETY APPLIANCE ACT PROPER AND CONSISTENT WITH THE ENTIRETY OF ITS FINDINGS?

The Trial Court Answered "YES".

The Court of Appeals Answered "YES".

Plaintiff-Appellee Answers "YES".

C. DID THE TRIAL COURT HARMONIZE THE JURY'S VERDICT WITHOUT DIFFICULTY AS REQUIRED IN MICHIGAN?

The Trial Court Answered "YES".

The Court of Appeals Answered "YES".

Plaintiff-Appellee Answers "YES".

III. IS THE JURY'S CONCLUSION THAT WILLIAM FRANK WARD, AS A RESULT OF CONRAIL'S USE OF A DEFECTIVE HANDBRAKE, WAS DISABLED FROM HIS EMPLOYMENT AS A LOCOMOTIVE ENGINEER AND REQUIRED SURGERY, AGAINST THE WEIGHT OF THE EVIDENCE?

The Trial Court Answered "NO".

The Court of Appeals Answered "NO".

Plaintiff-Appellee Answers "NO".

A. DID WILLIAM FRANK WARD PRESENT SUBSTANTIAL EVIDENCE AT TRIAL PERMITTING THE JURY DETERMINATION THAT HE WAS DISABLED FROM HIS EMPLOYMENT AS A LOCOMOTIVE ENGINEER AND REQUIRED SUBSTANTIAL SURGERY AS A RESULT OF CONRAIL'S USE OF A DEFECTIVE HANDBRAKE?

The Trial Court Answered "YES".

The Court of Appeals Answered "YES".

Plaintiff-Appellee Answers "YES".

IV. WAS THE TRIAL COURT CORRECT IN GRANTING MEDIATION SANCTIONS PURSUANT TO MICHIGAN COURT RULE § 2.403?

The Trial Court Answered "YES".

The Court of Appeals Answered "YES".

Plaintiff-Appellee Answers "YES".

A. BY SUBMITTING TO, AND DERIVING THE BENEFIT OF, THE CASE EVALUATION PROVIDED FOR IN MCR 2.403, IS CONRAIL PRECLUDED FROM NOW CHALLENGING ITS APPLICATION?

The Trial Court Answered "YES".

The Court of Appeals Answered "YES".

Plaintiff-Appellee Answers "YES".

B. DOES FEDERAL LAW NOT ACTUALLY CONFLICT WITH MCR 2.403, THUS PERMITTING THE TRIAL COURT'S ORDER OF MEDIATION SANCTIONS IN ACCORDANCE WITH THE RULE?

The Trial Court Answered "YES".

The Court of Appeals Answered "YES".

Plaintiff-Appellant Answers "YES".

C. DOES THE TRIAL COURT'S AWARD OF WILLIAM FRANK WARD'S COSTS CONSTITUTE AN ABUSE OF DISCRETION?

The Trial Court Answered "NO".

The Court of Appeals Answered "NO".

Plaintiff-Appellee Answers "NO".

STATEMENT OF FACTS

On February 19, 1998, William Frank Ward was performing his duties in the course and scope of his employment as an engineer with Conrail on its property near Bryan, Ohio. At approximately 7:15 p.m., Ward was finishing his day's work and, as required, was attempting to secure locomotive 8181, which included setting of the ratchet style manual handbrake. As Ward was ratcheting the handle of the brake in an upward motion, it came to an unexpected and complete stop. Ward testified that he was "in mid-stride, I'm coming up and it stopped, it just stopped. And when it did, in my back, just as low as it could be in my back, it just snapped, just a snapping." Tr. Vol. IV, at 152.

Although Ward felt significant pain at the time of the injury on February 19, 1998, because no one was on duty to whom the injury could be reported and the equipment was not scheduled to be used again until the next day, Mr. Ward did not submit a personal injury report until the following day when he began his shift. Thereafter, Conrail, through its internal disciplinary proceeding, charged Ward with two alleged rule violations including: (1) failure to submit a timely personal injury report and, (2) failure to protect another employee from possible harm due to the defective condition of the handbrake of locomotive 8181. During Ward's disciplinary process, Conrail admitted that the handbrake was unsafe and jeopardized employee safety and set forth that admission in writing. In return, Ward admitted to the two rule violations. Notice of Discipline, May 14, 1999.

Prior to sustaining his severe lower back injury due to locomotive 8181's handbrake on February 19, 1998, Ward had complained about that very locomotive handbrake to his trainmaster, Tom Barr, about one to two months prior to the accident. Tr. Vol. IV, at 144-145. Barr, the first-line supervisor for engine and trainmen, admitted that the handbrake on engine 8181 had been reported to him approximately one week prior to the Ward injury as being defective.

> Q: And did you observe that Mr. Sullivan [a coworker of Ward and on Ward's crew on February 19, 1998] also reported at that time to the claim agent that the handbrake had jammed and had to be loosened with a pry bar approximately a week earlier?
>
> A: Yes.
>
> Q: Let me ask you this. When you talked to Mr. Sullivan, did he tell you those same things that next morning?
>
> A: Yes.
>
> Q: I take it you learned those same things also from Mr. Parker [another fellow worker of Ward], that is, that in his judgment, the handbrake was defective and there had been a prior instance where the thing had misperformed?
> A: I believe they both talked about it not releasing.

Barr Deposition, at 28-29, admitted at Tr. Vol. IV, p. 97 ("Barr Dep.").

Barr had first-hand experience with the handbrake not functioning properly or as intended prior to the Ward injury:

> Q: Had you had it jam so that it wouldn't release?
>
> A: Yes.
>
> Q: Do you know why that happened?

A: No.

Q: Did it have a clevis mending the chain at that point in time?

A: Yes.

Q: Did you look at it and see if the clevis had gotten bound in the mechanism?

A: I believe at the time that it stuck for me or I was trying to release it, that the - the chain was just binding inside there, and it came - eventually came loose. I had to use a pry bar on it.

Q: You had to use a pry bar on it too?

A: Yes.

Id., at 31.

For unexplained reasons, even though Barr, the supervisor, knew that the handbrake was not functioning properly or as intended based on his first-hand experience, as well as the reports of others, he did not report the handbrake as defective, nor did he send it to a maintenance facility for repairs until after Ward was injured.

Q: I'm going to show you Plaintiff's Exhibit 11, which, I think, is a document that you brought with you here today.

A: No, I didn't bring that one with.

Q: Or you reviewed it before your deposition.

A: Yes. Yes, I did.

Q: Is that your signature on the bottom?

A: Yes.

Q: -- "Tom Barr?"

A: Yes.

Q: You reported the handbrake as being defective?

A: Yes.

Q: And that was on March 9, 1998 [approximately two weeks after Ward was injured on the same piece of equipment]?

A: That's the date on it, yes.

Id., at 35-6.

Moreover, Jeffrey Chandler, a machinist in Conrail's Elkhart, Indiana diesel shop during the time period in question, testified that engine 8181 had been in the shop for maintenance on February 15, 1998, but no repairs were made to the handbrake because no problem with it had been brought to his attention. The locomotive only received routine maintenance. Tr. Vol. III, at 89-91. Conversely, when the locomotive went to the Elkhart diesel shop on March 11, 1998, documents accompanied it that suggested to the mechanical department that there was a defective or bad order condition with the handbrake. Id., at 99. As a result, Mr. Chandler reviewed the handbrake completely. Id., at 101.

Conrail failed to fix the defective handbrake following complaints by Barr, Sullivan, Ward, and at least one other employee (Timothy Parker) who experienced the handbrake malfunction in precisely the same manner as did Mr. Ward, as well as the personal experience of Barr with the handbrake jamming, until after Ward was hurt. Conrail finally fixed the defective handbrake on locomotive 8181 on or about March 11, 1998,

almost a month after Ward sustained his injuries.

As a result of this accident, Ward sustained severe and permanent injuries to his back and spine, including disc injuries which ultimately required him to undergo a bilateral laminectomy of L4 with bilateral microdiskectomy and foraminotomy with posterior fusion of L4 to L5. Plaintiff's treating physicians, Dr. Robert Levine and Dr. Lawrence Rapp, concluded that Ward's injuries and resulting need for surgery are causally related to his February 19, 1998 on the job accident.

Trial commenced on November 13, 2000. On November 22, 2000 the jury awarded Ward $800,000 for damages resulting from Conrail's violation of the Federal Safety Appliance Act. Judgment was entered on January 5, 2001. On February 2, 2001, the trial court granted William Frank Ward's motion for taxation of costs and mediation sanctions pursuant to both parties' voluntary submission to Michigan Court Rule 2.403. On March 16, 2001, the trial court entered an order quantifying the sanctions in the amount of $64,592.

In a thorough, thoughtful and well-reasoned unpublished decision dated August 7, 2003, Judges David H. Sawyer, Patrick M. Meter and Bill Schuette affirmed the Trial Court and the jury's verdict in virtually all respects, remanding the case to the Trial Court to reduce the mediation sanction costs associated with the work of Plaintiff-Appellant's attorneys' paralegal. While those costs would seem to have been in accord with the guidance provided by *Joerger v. Gordon Food Service, Inc.*, 224 Mich App 167,

181-183; 568 NW2d 365 (1997), the Court of Appeals interpreted that decision to the contrary. Plaintiff-Appellant has elected not to cross-appeal on this very limited issue.

OVERVIEW

DEFENDANT-APPELLANT HAS NOT PRESENTED QUESTIONS FOR REVIEW WARRANTING EXTRA-ORDINARY SUPREME COURT REVIEW.

Defendant-Appellant's application and its brief fail to satisfy any of the criteria of MCR 7.302 (B). In fact, extraordinarily scant mention is made of those leave criteria anywhere in Defendant-Appellant's Application or Brief.

The leave standards essentially exhort this Court to devote its scarce decisional resources to cases presenting overriding unsettled issues of law of widespread application [See, e.g. MCR 7.302 (B)(3) ("legal principles of major significance to the state's jurisprudence"); (5) ("the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals")].

At its core, Defendant-Appellant's Application demonstrates that it simply does not like the jury's award of compensation to Mr. Ward who suffered career-ending injuries requiring major surgery as a function of the incident involving the defective handbrake occurring on February 19, 1998. The case was fairly tried and the jury properly instructed such that the most that can accurately be said is that Defendant-Appellant takes issue with the way the jury, trial judge and appellate panel applied the facts to settled law. This is hardly unusual among disgruntled litigants ordered to compensate those they have wronged.

This is a case involving unique facts to which clearly settled law has been applied by a jury, a circuit court judge, and three Court of Appeals Judges. This case simply does not warrant Supreme Court review.

ARGUMENT

I. The Trial Court Was Correct in Ruling That, Because Conrail Had Destroyed the Handbrake at Issue, Ward Was Entitled Before Trial to a Presumption and, at the Conclusion of Trial, to the Extent Some Rebuttal Evidence was Proffered, A Permissible Inference That it Was Defective.

A. Standard of Review

Appellant Conrail challenges the trial court's ruling that a jury "could presume," or, when rebutted with some evidence, permissibly "infer", from the fact it was destroyed by Conrail, that the handbrake involved in the injuries suffered by William Frank Ward was defective. A trial court's instructional rulings are entitled to substantial deference and will be reversed only when "the failure to set aside the verdict would be 'inconsistent with substantial justice' . . ." . *Johnson v Corbet*, 423 Mich 304, 326; 377 NW2d 713 (1985).

B. Michigan Law Allowed a Pre-Trial Presumption That Evidence Destroyed While Under Conrail's Control, if Produced at Trial, Would Operate Against Conrail and in William Frank Ward's Favor.

Following William Frank Ward's injury on February 19, 1998, but before Ward had an opportunity to examine the handbrake mechanism, Conrail removed the mechanism from service and destroyed the evidence. The handbrake was permanently destroyed on March 11, 1998, after Ward submitted his personal injury report on February 20, 1998, after a report was made earlier in February, 1998, by a coworker of Mr. Ward, that the

brake was defective, and after a March 9, 1998 report by Mr. Ward's supervisor, Tom Barr, reported that the brake mechanism was defective. By discarding the handbrake mechanism after it was put on notice that Ward had been injured and after Conrail's claim agent had received the two additional statements that the handbrake was defective before Ward's injury, Conrail was solely responsible for destroying an invaluable piece of material evidence within its control.

This evidence was critical because the handbrake housing would have revealed scarring or other deformation consistent with contact from the oversized clevis. Measurements and tests could have been conducted which would have proved unequivocally that the handbrake worked inefficiently in both the set and release modes in a totally unpredictable manner just as alleged by Plaintiff.

Under Michigan law, Ward was thus properly entitled to a pre-trial presumption that if the evidence were produced at trial, it would operate against the party who deliberately destroyed it, as the Court concluded. *Johnson v Secretary of State*, 406 Mich 420, 440; 280 NW2d 9, 14 (1979); *Ritter v Meijer, Inc*, 128 Mich App 783, 786; 341 NW2d 220; 222 (1983).

C. It Was Not Inconsistent With Substantial Justice For the Trial Court to Instruct the Jury That It Was Allowed to Infer That the Destroyed Evidence Was Unfavorable to Conrail.

Following the presentation of Conrail's case, the Court determined that Conrail had presented some evidence to rebut the presumption that the handbrake was defective. As

a result, the Court instructed the jury in accordance with the principles of M Civ JI 6:01 as follows:

> Certain evidence relevant to this case, namely the handbrake, the clevis and chain, were not available at trial because they were destroyed while in the possession or in the control of the defendant. The rules of evidence provide that you, the jury, may infer that this evidence was unfavorable to the defendant.

Tr. Vol. VIII, at 8, (emphasis added). This instruction represents a correct statement of the law applicable to the facts of this case.

After Conrail presented evidence tending to rebut the presumption Ward was entitled to under *Johnson* and *Ritter*, the trial court properly allowed the jury to infer a defect, rather than compel that conclusion. As brought to the trial court's attention by counsel for appellee, not appellant, the Michigan Supreme Court removed all confusion regarding civil presumptions, defining them succinctly and completely:

> [T]he function of a presumption is solely to place the burden of producing evidence on the opposing party. It is a procedural device which allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption. Almost all presumptions are made up of permissible inferences. Thus, while the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced.

Widmayer v Leonard, 422 Mich 280, 289; 373 NW2d 538, 542 (1985) (emphasis added).

Thus, despite Conrail's attempts to interpret it otherwise, Michigan law authorizes

the permissible instruction inference given to the jury in this case. Ward was entitled to an instruction permitting the jury to infer a defect. The trial court's reference to the original presumption, the existence of rebuttal evidence, and the instruction permitting, but not compelling, an inference of defect, were made in accordance with Michigan law. *Widmayer, supra*, at 373 NW2d 542; *see also State Farm Mutual Automobile Ins Co v Allen*, 191 Mich App 18, 23; 477 NW2d 445, 448 (1991) (presumption becomes permissible inference when rebutted).

D. The Three-Judge Panel of the Court of Appeals Correctly Rejected Defendant-Appellant's Contention That Its Employee Did Not In Fact "Destroy" The Handbrake, But, Rather, Simply Discarded It In The Ordinary Course of Business.

This argument was clearly rejected not only by the Trial Court and Jury, but also by the Court of Appeals. There was evidence of a deliberate destruction of clearly material evidence warranting the presumption and, thereafter, a permissible inference. As the Court of Appeals observed:

> We do not agree that this issue warrants reversal. As noted in *Johnson v. Secretary of State*, 406 Mich 420, 440; 280 NW2d 9 (1979):
>
> > The rule is well established that where there is a deliberate destruction of or failure to produce evidence in one's control a presumption arises that if the evidence were produced it would operate against the party who deliberately destroyed or failed to produce it.
>
> *See also Ellsworth v. Hotel Corp of America*, 236 Mich App 185, 193; 600 NW2d 129 (1999). Here, the handbrake had been in defendant's control. Moreover, evidence existed that the handbrake was discarded by defendant after plaintiff had

made an injury report with respect to it, and thus defendant should have been aware of the need to retain the handbrake. *See, generally, Brenner v. Kolk*, 226 Mich App 149, 162; 659 NW2d 684 (1997). Under the above case law, the trial court correctly found, as a preliminary matter, that a presumption in favor of plaintiff existed.

Moreover, the court properly instructed the jury. Defendant cites *Widmayer v. Leonard*, 422 Mich 280; 373 NW2d 538 (1985), and *State Farm Mut Automobile Ins Co v. Allen*, 191 Mich App 18; 477 NW2d 445 (1991), in support of its argument that the pertinent instruction given by the court with regard to the presumption was incorrect. In *Widmayer, supra* at 288, the Court clarified that a party entitled to a presumption is not entitled to have the jury automatically accept the presumption in the fact of sufficient rebuttal evidence. The Court held:

> [I]f the jury finds a basic fact, they must also find the presumed fact unless persuaded by the evidence that its nonexistence is more probable than its existence.
>
> We so hold because we are persuaded that the function of a presumption is solely to place the burden of producing evidence on the opposing party. It is a procedural device which allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to produce evidence rebutting the presumption.
>
> Almost all presumptions are made up of permissible inferences. Thus, while the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced. But always it is the inference and not the presumption that must be weighed against the rebutting evidence. [*Id.*]

In *State Farm, supra* at 23, this Court discussed *Widmayer* and indicated that if a plaintiff is initially entitled to a presumption and "the defendant has presented evidence sufficient to rebut" the presumed fact, the presumption no longer exists but becomes a "permissible inference."

The court's instruction in this case conformed to *Widmayer* and *State Farm*. The court instructed the jury as follows:

> Certain evidence relevant to this case, namely the handbrake, the clevis and chain, were not available at trial because they were destroyed while in the possession or in the control of the defendant. The rules of evidence provide that you, the jury, may infer that this evidence was unfavorable to the defendant.

The instruction referred merely to an "inference" and therefore conformed to the above case law. No error requiring reversal is apparent.

Defendant also appears to argue that the court, in ruling on the pretrial motion regarding the presumption, should have taken into account the rebuttal evidence defendant produced during discovery and ruled *initially* that plaintiff was entitled only to an inference and not to a presumption under *Widmayer* and *State Farm*. We again see no basis for reversal. First, *Widmayer* and *State Farm* specifically refer to jury instructions and not to pretrial determinations. *Id.; Widmayer, supra* at 288-289. Second, any error by the court in this regard did not deprive defendant of a fair trial. While plaintiff's attorney used the term "presumption" in its arguments, the court specifically instructed the jury that the attorney's arguments, statements, and remarks were not evidence. Moreover, and significantly, the court ultimately gave a proper instruction about the inference. Reversal is therefore unwarranted.

See Unpublished Opinion of State of Michigan Court of Appeals No. 234619, pp. 2-3.

E. The Jury Was Properly Instructed Consistent With The Principles of M Civ JI 2d 6:01.

Defendant-Appellant suggests the trial court erred in failing to read the second half of the second sentence of M Civ JI 2d 6.01. The Court of Appeals dispensed with that argument commenting:

> Defendant also suggests that the court erred by failing to read the jurors the second half of the second sentence of SJI2d 6.01(c), which states that an inference for failure to produce evidence exists "if you believe that no reasonable excuse for [defendant's] failure to produce the evidence has been shown." Defendant contends that it had a reasonable excuse for failing to produce the handbrake and

that the jurors should have been given the instruction in question. However, aside from citing the jury instruction itself, defendant cites no legal authority in support of his argument that the instruction should have been given. An issue that has been given cursory treatment with little or no citation to relevant supporting authority is not properly presented for review. *Silver Creek Twp v. Corso,* 246 Mich App 94, 99; 631 NW2d 346 (2001); see also *Palo Group Foster Care, Inc. v. Dep't of Social Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998). Moreover, although defendant represents that it asked the court to read this line from SJI2d 6.01(c), and although defendant made a similar representation when arguing for a judgment notwithstanding the verdict (JNOV), our review of the record fails to demonstrate that defendant did in fact request that the court read the line in question. While the court made a reference to rejecting certain of defendant's proposed jury instructions, it did not specify the last phrase of SJI2d 6.01(c) as one of the requested instructions. Moreover, the instruction in question is not located in the original proposed jury instructions submitted by defendant and filed in the trial court. As an appellate court, we are limited to the record before us. *Sherman v. Sea Ray Boats, Inc,* 251 Mich App 41, 56; 649 NW2d 783 (2002). On the present record, no clear request for the instruction in question by defendant [4] is apparent, and therefore the issue is not preserved for appellate review.

The Standard Jury Instructions do not carry the force of law. *Shinholster v. Annapolis Hosp,* 255 Mich App 339, 350 n 8; 660 NW2d 361 (2003).

Although they are not entirely clear, the transcripts suggest to us that *plaintiff* requested that some portion of SJI2d 6.01 be read to the jury.

II. The Findings by the Trier of Fact Were Consistent, and the Trial Court's Failure to Overturn the Verdict or Grant a New Trial Was Not An Abuse of Discretion.

A. Standard of Review

It is within trial court's sound discretion to grant or deny motion for new trial. Absent an abuse of discretion, the decision of the trial court cannot be interfered with on appeal. *Kailimai v Firestone Tire & Rubber Co*, 398 Mich 230, 232; 247 NW2d 295, 296 (1976). Further, in reviewing denial of a motion for new trial, deference should be given to the trial court's unique ability to judge weight and credibility of testimony and no judge may substitute its judgment for that of jury unless the record reveals a miscarriage of justice. *Heshelman v Lombardi*, 183 Mich App 72, 76; 454 NW2d 603, 605 (1990).

B. Evidence or Jury Findings on a Negligence Theory Are Irrelevant to and Do Not Relieve Conrail of its Absolute Liability for Injuries Caused, In Whole or In Part, By a Violation of the Federal Safety Appliance Act

The Federal Safety Appliance Act provides for recovery by an injured party when the injury was caused, in whole or in part, by a violation of the Act, irrespective of proof of negligence. The United States Supreme Court confirmed this proposition early in the Act's history, stating:

> [T]his court early swept all issues of negligence out of cases under the Safety Appliance Act. For reasons set forth at length in our books, the court held that a failure of equipment to perform as required by the Safety Appliance Act is in itself an actual wrong, and no way dependent upon negligence for the proximate results of which there is liability - a liability that cannot be escaped by proof

of care or diligence.

O'Donnell v Elgin, Joliet & Erie Railway Company, 338 US 384, 390 (1949) (emphasis added).

A Plaintiff who convinces the trier of fact that a covered safety appliance, such as the handbrake on a locomotive engine, fails to operate properly or efficiently, is entitled to absolute recovery, without respect to negligence. *Id.*; *Brady v Term RR Ass'n*, 303 US 10, 15 (1938). Contrary to the stance taken by appellant, the duty imposed is an absolute one and is not excused by any showing of care. *Id.*; *see, also*, 11 Am Jur Trials, FELA Litigation, at § 5 (injuries resulting in whole or in part from a defect recognized by the FSAA are compensable absolutely and without requirement of negligence).

Equally important is the irrelevance of evidence regarding the operation of the handbrake either before or after the day it failed to operate efficiently and injured William Frank Ward. Conrail's assertion that the handbrake did not fail either before or after the incident, which is controverted plainly by the testimony of Alfred Reinig, Jeffrey Chandler, Thomas Barr, as well as by earlier complaints and Conrail's decision to destroy the handbrake, is not relevant to the issue of FSAA liability, which discards evidence of normal efficiency and asks only whether the appliance failed "on the occasion in question." *Affolder v New York, C & St LR Co*, 339 US 96, 98 (1950). It did fail in this case, injuring William Frank Ward in whole or in part, and for those injuries Conrail is wholly and absolutely liable.

William Frank Ward established, and the jury concurred, that the handbrake failed to comply and function efficiently at the time he used it, in violation of the FSAA, causing Ward's injury in whole or in part. As a result, it is irrelevant to Ward's recovery whether or not Conrail had acted reasonably in maintaining or inspecting the handbrake -- Ward recovers absolutely as a party injured by this particular handbrake at this particular time, in violation of the FSAA. *Myers v Reading Co*, 331 US 477 (1947).

C. The Jury's Determination That Conrail Violated the Federal Safety Appliance Act Was Proper and Consistent With the Entirety of its Findings.

The trial court declined to grant Conrail's motion for a new trial because it did not agree with Conrail's contention that the jury returned an inconsistent verdict, no doubt because the jury's answers to the special verdict questions are easily harmonized when one understands the law unique to the FELA. Specifically, the trial court would not overturn the jury's proper determination that Conrail violated the Federal Safety Appliance Act ("FSAA"). The trial court acted properly and within its discretion. The jury's finding that Conrail violated the Federal Safety Appliance Act is consistent with the balance of its findings, including that Conrail was not in violation of the Locomotive Inspection Act ("LIA").

To establish a violation under the LIA, the locomotive at issue must have been "in use" or "in service" at the time of the incident. 49 USC § 20701; *see Crockett v Long Island RR*, 65 F3d 274 (2d Cir 1995). In this case, Ward was applying the handbrake in

connection with securing the locomotive in the yard for the night. The jury may have rejected Ward's contention that the locomotive was in use at the time of his injury and therefore concluded that there could be no violation of the LIA. Further, the LIA emphasizes the railroad's absolute duty to operate locomotives in a safe manner. *Lilly v Grand Trunk W RR Co*, 317 US 481, 485 (1943); *McGrath v Consolidated Rail Corp*, 943 F Supp 95, 96 (D Mass 1996).

In contrast, the FSAA does not impose a requirement that the locomotives be "in use" at the time of a failure to operate. Instead, the FSAA places railroads engaged in interstate commerce under an absolute and unqualified duty to provide efficient handbrakes upon the cars of their trains. *Chicago, B&WR Co v United States*, 220 US 559 (1911). 49 USC § 20302 provides in part:

> (a)[A] railroad carrier may use or allow to be used on any of its railroad lines - -
>
> (1) a vehicle only if it is equipped with - -
>
> (B) secure sill steps and efficient handbrakes (emphasis added).

The term "efficient" under the FSAA has been defined by the United States Supreme Court as "adequate in performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect; incapable; incompetent; inadequate." *Myers v Reading Co*, 331 US 477, 483 (1947).

"Efficient" as used in the FSAA is not synonymous with "safe" as used in the LIA.

The jury may have concluded that the use of an oversize clevis mending the chain did not, in and of itself, present an "unnecessary danger of personal injury" or render the handbrake "unsafe" as required under the LIA. Nonetheless, based upon the testimony presented at trial, the jury permissibly concluded that the oversize clevis rendered the handbrake "inefficient," in violation of the FSAA.

The testimony amply supports this conclusion. Machinist Ray Chandler testified that if a clevis is too large it may interfere with the proper and efficient operation of the handbrake:

Q: In other words, it makes a difference what the size of the clevis is, does it not?

A: Yes, sir.

Q: If it's too large, it can interfere, correct?

A: Yes, sir

Q: Even if it's just a little too large, it can interfere, correct?

A: Potentially yes, sir

Q: Similarly, if the clevis is in the wrong location, that can cause a potential for interference, too, can it not?

A: Definitely

Q: And affect proper and efficient operation?

A: Yes, sir.

* * *

Q: Okay. If this clevis that was mending this chain should contact the brake housing in application or become lodged in the housing, such that it can't release, that's not proper operation, is it, sir?

A: No, sir.

Q: That would not be as the railroad intends for this device to work, true?

A: True.

Q: That would not be either efficient or safe for that matter either, would it?

A: No, sir, it wouldn't be safe.

Q: It would present a risk of injury to an employee applying that handbrake, true?

A: Yes, sir.

Tr. Vol. IV, at 50-52. Emphasis supplied.

He further testified that if a handbrake stopped suddenly and unexpectedly without warning, as Ward claimed, the handbrake would not be functioning properly. Id., at 52. Co-worker Tim Parker testified that, based upon his own experience with the handbrake at issue, it neither operated as intended nor efficiently, and should have been taken out of service, inspected and repaired.

Q: When this handbrake jammed on you on application in the past, sir, as far as you're concerned, based on your experience with the railroad, was it operating properly and as intended?

A: No.

Q: Was it operating efficiently?

A: No.

Q: Do you think, based on your experience, it should have been taken out of service, inspected, and repaired?

A: Yes.

Tr. Vol. III, at 80. Emphasis supplied.

Machinist Jeff Chandler agreed that a clevis mending the chain could get caught or jam in the mechanism and cause the handbrake not to function properly.

Q: Is it true, sir, that a clevis could get caught or jam a mechanism such as a handbrake when used to mend a chain in the application mode, too?

A: Yes.

Q: So a clevis mending a chain, could cause the handbrake not to function properly or as intended, when one is applying the handbrake, correct?

A: Yes.

* * *

Q: Not supposed to function that way, is it?

A: No, sir.

Q: That would not be functioning properly, as you understand the proper function of a handbrake, would it, sir?

A: No, sir, it wouldn't be.

Id., at 100.

Ward's expert, Alfred Reinig, testified that the handbrake will not jam every time it is used as a result of the oversized clevis mending the chain. Rather, the handbrake could jam randomly as a result of numerous adjustments. Id., at 17. Reinig concluded that, based upon the testimony of Conrail's own employees and his many years of experience, the handbrake was not working properly or efficiently, exposing persons like Ward to an unreasonable risk of harm. Id., at 20-21.

The jury may well have concluded that the handbrake's failure to function rendered the handbrake inefficient, incapable, incompetent or inadequate under the FSAA, but not necessarily unsafe under the LIA. The Court's jury instructions, read verbatim as submitted by Conrail, properly highlighted the differences in the laws:

> Plaintiff alleges that at the time and place in question the defective condition of the handbrake was a cause in whole or in part of the plaintiff's injuries and consequential damages. Under the Federal Locomotive Inspection Act a railroad may use a locomotive in its line only when the locomotive and its parts are in proper condition and safe to operate without unnecessary danger of personal injury.
>
> * * *
>
> Under the Federal Safety Appliance Act, a railroad may use on its line a vehicle only if it is equipped with efficient handbrakes. A vehicle includes a locomotive. Efficient means adequate in performance producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect incapable, incompetent and inadequate.

Tr. Vol. VIII, at 12-13 (emphasis added).

D. The Trial Court Harmonized the Jury's Verdict Without Difficulty and as Required in Michigan.

The Michigan Supreme Court has recently reiterated the court's obligation to harmonize a jury verdict:

> A jury's verdict is to be upheld, even if it is arguably inconsistent, "[i]f there is an interpretation of the evidence that provides a logical explanation for the findings of the jury." In deciding whether to grant a new trial, a circuit court must "make every effort to reconcile the seemingly inconsistent verdicts." Further, such an effort "requires a careful look, beyond the legal principles underlying the plaintiff's causes of action, at how those principles were argued and applied in the context of this specific case."

Bean v Directions Unlimited, Inc, 462 Mich 24, 31-32; 609 NW2d 567, 571 (2000) (internal citations omitted).

Here, the trial court's job was made easy, as the jury verdict was not inconsistent and, when taken in context of the two distinct statutes, quite logical. In harmonizing the jury's findings, as opposed to substituting its judgment for that of the trier of fact, the trial court committed no abuse of discretion, but instead carried out the express mandate of law in this jurisdiction.

E. The Three-Judge Panel of the Court of Appeals Correctly Rejected Defendant-Appellant's Argument Concerning the Irreconcilability of the Jury's Findings.

The Court of Appeals wrote:

> Next, defendant argues that the jury's findings were

irreconcilably inconsistent and that the trial court therefore should have granted either (1) defendant's motion for a JNOV or (2) defendant's motion for a new trial based on the great weight of the evidence. When reviewing a trial court's denial of a motion for a JNOV, this Court examines the evidence and all legitimate inferences arising from the evidence in the light most favorable to the non-moving party. *Attard v. Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999). A motion for a JNOV should be granted only if there was insufficient evidence presented to create a jury-triable issue. *Id.* This Court reviews a trial court's decision with regard to a motion for a new trial for an abuse of discretion. *Morinelli v. Providence Life and Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000). The trial court's function when reviewing a motion for a new trial based on the great weight of the evidence is "to determine whether the overwhelming weight of the evidence favors the losing party." *Id.* This Court gives substantial deference to the trial court's conclusion that the verdict was not against the great weight of the evidence. *Id.*

Defendant specifically focuses on the jury's findings as reported on the verdict form. Defendant argues that because the jury found (1) that the handbrake was "in proper condition and safe to operate" under the Federal Locomotive Inspection Act (FLIA), 49 USC § 20701 *et seq.* and (2) that defendant was not negligent on the day in question, the jury acted inconsistently and illogically in simultaneously finding that the handbrake was not "efficient under 49 USC § 20302(a)(1)(B), a provision of the FSAA, and that this inefficiency caused plaintiff to incur damages.

The FLIA states, in relevant part, that

[a] railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts or appurtenances . . .

> [a]re in proper condition and safe to operate without unnecessary danger of personal injury. [49 USC § 20701(1).]

The trial court instructed the jury as follows with regard to the FLIA:

> Plaintiff alleges that at the time and place in question the defective condition of the handbrake was a cause in whole or in part of the plaintiff's injuries and consequential damages. Under the [FLIA] a railroad may use a locomotive on its line only when the locomotive and its parts are in proper condition and safe to operate without unnecessary danger or personal injury.

The FSAA states, in relevant part, that "railroad carrier may use or allow to be used on any of its railroad lines . . . a vehicle only if it is equipped with . . . [s]ecure sill steps and efficient handbrakes . . . ." 49 USC § 20302 (a) (1)(B). The court instructed the jury as follows with respect to the FSAA:

> Further, the plaintiff alleges that the defective condition of the handbrake on February 19th was a violation of the [FSAA].
>
> Under the [FSAA], a railroad may use on its line a vehicle only if it is equipped with efficient handbrakes. A vehicle includes a locomotive. Efficient means adequate in performance producing a properly desired effect. Inefficient means not producing or not capable of producing the desired effect incapable [sic], incomplete and inadequate. [5]

We initially note that under the FSAA, the statute deemed violated by the jury, a railroad may be held liable even if it has not been negligent. *O'Donnell v. Elgin, Joliet & Erie Railway Co*, 338 US 384, 390;70 S Ct 200; 94 L Ed 2d (1949). Accordingly, the jury's finding that defendant was not negligent on the day in question was not inconsistent with its award of damages under the FSAA. Moreover, the jury's findings under the FLIA and the FSAA are not necessarily inconsistent. Indeed, the jury might have concluded that the handbrake did not pose an "unnecessary danger of personal injury" and was not unsafe under the FLIA but that it nonetheless did not "produce the desired effect" as required by the FSAA and accompanying case law. Various

witnesses testified that the intermittent jamming of the handbrake constituted an inefficiency. As noted in *Bean v. Directions Unlimited, Inc,* 462 Mich 24, 31; 609 NW2d 567 (2000), a jury's verdict should be upheld, despite an apparent inconsistency, if a logical explanation for the jury's findings can be determined. The court must try to reconcile the seemingly inconsistent findings by examining how the relevant legal principles were argued and applied to the facts of the case. *Id.* at 31-32. Here, given the differing language employed by the FLIA and the FSAA, a logical explanation for the jury's findings is apparent, and the trial court therefore did not err in upholding the verdict.

The court's definitions of "efficient" and "inefficient" were consistent with Supreme Court precedent. See *Myers v. Reading Co,* 331 US 477, 483, 67 S Ct 1334; 91 Ed 2d 1615 (1947). *Id.*

State of Michigan Court of Appeals Unpublished Decision No. 234619, pp. 4-5.

III. The Jury's Conclusion That William Frank Ward, as a Result of Conrail's Use of a Defective Handbrake, Was Disabled From His Employment as a Locomotive Engineer and Required Surgery, Was Not Against the Weight of the Evidence.

A. Standard of Review

As in the preceding section, in determining whether evidence was overwhelming, in reviewing denial of motion for new trial, a court should not substitute its judgment for that of jury unless the record reveals miscarriage of justice. *Heshelman*, *supra*, at 454 NW2d 605. Further, in determining whether a jury verdict should have been vacated as against the great weight of the evidence, demanding a new trial, the Court cannot upset the lower court determination absent an abuse of the trial court's discretion. *Kailimai*, *supra*, at 247 NW2d 296.

Again, because factual questions existed upon which reasonable minds could differ, the Court should affirm following an examination of the evidence at the close of trial, in a light most favorable to William Frank Ward, deciding, de novo, whether any question of fact existed. *Hatfield*, *supra*, at 535 NW2d 272.

B. William Frank Ward Presented Substantial Evidence at Trial Permitting the Jury Determination That He Was Disabled From His Employment as a Locomotive Engineer and Required Substantial Surgery as a Result of Conrail's Use of a Defective Handbrake.

Appellant Conrail continues to argue that somehow the expert testimony it presented was the only valuable expert testimony and the jury could not be permitted

to conclude differently. Fortunately, our judicial system permits competing qualified experts, from which reasonable minds, especially those empaneled by a court to decide litigated matters, can draw their own conclusions.

William Frank Ward offered the testimony of not just any surgeon, but his treating neurosurgeon, Dr. Lawrence G. Rapp. Dr. Rapp, duly qualified, opined to a reasonable degree of medical certainty that the sudden binding of the handbrake did, indeed, cause Mr. Ward's injuries. Plaintiff's Exhibits 58 and 127, at p. 3; Rapp Dep., at 56-57. This testimony is based not only on the close temporal relationship between the two events, but also on Ward's complete medical history, including his oral history, the nature of his injuries and objective findings on both physical exam and diagnostic studies. Rapp Dep., at 85. According to Doctor Rapp, the mechanics of an injury caused by a jolt of the type suffered by Ward are wholly consistent with Ward's reported injuries. Id. Moreover, the diagnosis and treatment of those injuries were based on objective findings, including an MRI, myelogram, CT scans, operative report, and transforaminal block records. Id. As Doctor Rapp testified in his deposition, specifically rejecting Conrail's contention that his opinion as to causation was based exclusively on the closeness in time of the handbrake incident and onset of symptoms:

> I make my opinion on multiple things. My opinion is based on the history as provided by the patient. My opinion is based on the mechanism of the injury. The history is based on the findings. My history is based on

> the appropriateness of all the information that is given to me. No one thing is looked at in isolation.

Id.

Doctor Rapp further testified that his opinion is based on his examinations of Ward, as well as on Ward's transforaminal block, myelogram, and MRI. Id., at 85-86, 88-89. Each of these tests is accepted in the fields of orthopedics and neurosurgery and is commonly relied upon by medical professionals, including Conrail's own medical expert. It is clear from the depositions of Ward's physicians that Conrail erroneously attempts to focus on the temporal relationship of the incident and symptomology, to the exclusion of all other factors the doctors considered. Id., at 85. Clearly, a closeness in time between a traumatic occurrence and experiencing pain or other symptoms is one factor that physicians can and do properly consider in their medical practices. While Conrail argues that the holding of *Daubert v Merrill Dow Pharmaceuticals*, 509 US 579 (1993), along with the Michigan statute governing admissibility of expert opinions, MCLA 600.2955, govern, we see nothing therein to support Conrail's notion that evidence of causation based upon a temporal relationship must be strictly excluded.

To illustrate, we analyze *Taylor v Conrail*, 114 F3d 1189 (6th Cir 1997), overwhelmingly relied upon by Appellant, where medical evidence was excluded because it could not be verified "within the bounds of reasonable

medical certainty." To claim analogy to this case on that ground is, frankly, insulting to the highly qualified Doctor Rapp. In any event, the Taylor exclusion went not to causation, but rather to whether plaintiff would continue to suffer future medical problems.

This is not Appellant's first attempt to impugn Dr. Rapp's testimony through cases with wholly dissimilar facts. In its post-trial brief, Conrail invoked *Cuevas*, 956 F Supp 1306, 1311 (SD Miss 1997), a case in which the excluded expert testimony was based solely on the temporal relationship between incident and injury and nothing more. Conrail continues to argue *Cartwright v Home Depot*, a case in which the physician significantly extended a model that had neither been tested nor reviewed. 936 F Supp 900, 903 (MD Fla 1996). It is hardly surprising that the trial court rejected these irrelevant cases and, more importantly, that Conrail partially abandoned its reliance on them. Conrail's continued, albeit lesser, reliance on *Taylor* and *Cartwright* remains unacceptable. They present sets of facts that stretch credulity or, to say the least, are unique, and are simply not comparable to the relatively straight-forward situation in which a traumatic event results in a lumbar disc injury, a circumstance which orthopedists and neurosurgeons such as Dr. Rapp encounter every day.

For that reason, *Daubert* analysis, at least as proffered by Conrail, is likewise

inapplicable to this case. Conrail misreads *Daubert* to require experts' opinions to have been scrutinized by peer review, and that they lay foundation with respect to the potential error rate or general acceptance in the scientific community. Such a reading creates the absurd result Conrail desires. Ward's experts need not have scientifically tested their opinions, but rather their methods. *Daubert*, 509 US at 590. The doctors' opinions, that a traumatic event such as Ward suffered can cause discogenic injuries consistent with those they objectively observed and conservatively and surgically treated, are widely accepted within the relevant scientific community of orthopedists and neurosurgeons. Indeed, Conrail would be hard-pressed to find an expert to disagree with that premise. Likewise, the methods that the doctors relied upon, including medical history; mechanism and nature of the injuries; and objective findings through transforaminal block, myelogram, MRI, and surgical findings as well as temporal relationship, are all well-respected, time-tested, and proven through scientific testing, verified results, and peer review. There was no basis to exclude Ward's medical doctors as experts or their testimony that the handbrake incident did, indeed, cause Ward's injuries.

The testimony of doctors Bergin and DeLeeuw, proffered by Conrail, supports the ultimate findings and conclusions of Dr. Rapp. Bergin testified that her diagnosis for the injury sustained on February 19, 1998 was "a left-leg radiculopathy with a lumbosacral strain." Bergin Dep., at 27. DeLeeuw testified that there was no

question but that Mr. Ward was injured at work for the railroad on February 19, 1998. DeLeeuw Dep., at 41-42. He further stated that while he had hoped Mr. Ward would get better over time, according to the written record, he did not. Id., at 56. DeLeeuw admitted that subsequent events had proved him wrong in the past and such appeared to be the case with Mr. Ward. Id.

Dr. Rapp, the treating neurosurgeon, testified that Mr. Ward should not return to work as the locomotive engineer. Rapp Dep., at 50-53. Ward attempted a trial effort at returning to work as a locomotive engineer in November 1999 and, because of the constant vibration, jolting and jarring, could not continue in that capacity. Dr. DeLeeuw agreed that a constant jolting, jarring and vibration was known to be harmful to the lumbar spine. DeLeeuw Dep., at 58.

Even Conrail's IME physician, Dr. Scott Monson, testified that Mr. Ward injured his low back utilizing the inefficient handbrake on February 18, 1998, Monson Dep., at 30, and that his injuries warranted permanent lifting and push/ pulling restrictions, Monson Dep., at 38-39; admitted Tr. Vol VII, at 85. Dr. Monson did not know if Mr. Ward was physically capable of returning to work as a locomotive engineer subsequent to the extensive surgery of May 18, 2000, but would let him "try" if it was a sedentary position. Id., at 39-40. A detailed job description for the position of locomotive engineer requires "heavy" exhilaration, requiring regular lifting of 50 lbs. or more, was admitted into evidence during the trial as

Exhibit 68. The job can never be sedentary and, as a result, it is not surprising that Ward's brief return to work was unsuccessful for medical reasons.

Conrail's attempt to maintain the testimony of its expert but, yet, reject the equally qualified testimony of the esteemed Dr. Rapp is unacceptable. In the final analysis, Dr. Rapp was uniquely qualified to discuss medical causation, as he was the only individual to have the disc damage under direct observation -- at his fingertips during the arduous surgery. Indeed, Dr. Rapp's testimony is not only generally consistent with that of Conrail's doctors, but his conclusions are based on similar diagnostic and treatment methods, overwhelmingly accepted in the profession. The reasonable minds of the jury were presented with two marginally different stories and, after a deliberate analysis of the testimony, the trier of fact reached its final conclusions. The decision of the trial court to preserve the sanctity of those determinations is to be commended, and the substitution of Conrail's opinion for that of the jurors remains unwarranted. The trial court exercised its discretion with caution and care.

C. The Court of Appeals Agreed That Dr. Rapp Had Adequate Foundation For His Opinions.

> In a related argument, defendant claims that the court should have granted its motion for a directed verdict, its motion for a JNOV, or its motion for a new trial based on the great weight of the evidence because the evidence demonstrated that plaintiff's back problems resulted from an unrelated back condition and not from the handbrake incident. Defendant emphasizes that (1) Dr. Rapp was the only physician who testified that plaintiff's back problems and eventual herniated disc resulted from the handbrake incident and (2) Dr. Rapp admitted that when he discovered the herniated disc in March 2000, he

had not seen plaintiff for eighteen months. Defendant therefore argues that the herniated disc could have resulted from an unrelated incident during those eighteen months and that Dr. Rapp improperly used the "temporal relationship" between the incident and the onset of symptoms to establish a causal relationship between the handbrake incident and plaintiff's back problems. Defendant further argues that Dr. Rapp properly relied on the "mechanism of injury" in establishing a causal relationship because Dr. Rapp admitted that he had no knowledge of factors such as the force used by plaintiff at the time of the handbrake's sudden stop. Once again, we cannot agree with defendant's argument. Dr. Rapp testified that he based his opinion regarding causation "on the multiple things" and that "[n]o one thing is looked at in isolation." He stated that he considered the temporal relationship between the incident and the onset of symptoms but that he also considered the history as provided by the patient and [e]very test that was available" to him. Contrary to defendant's suggestion on appeal, Dr. Rapp did not base his causation opinion solely on the temporal relationship between the incident and the onset of symptoms. Moreover, we disagree that Dr. Rapp was required to know every factor, such as the amount of force used by plaintiff in applying the handbrake, in analyzing the "mechanism of injury." There was simply "nothing novel, suspect, or unreliable" about Dr. Rapp's testimony concerning plaintiff's injury. See *People v. Stiller*, 242 Mich App 38, 55; 617 NW2d 697 (2000). The jurors heard conflicting views and acted within their prerogatives by choosing to accept Dr. Rapp's testimony. Reversal is unwarranted.

See, State of Michigan Court of Appeals Unpublished Decision No. 234619, p.8.

IV. The Trial Court Was Correct in Granting Mediation Sanctions Pursuant to Michigan Court Rule § 2.403.

A. Standard of Review

Two separate and distinct standards of review are required for the analysis which the Court must take in reviewing the trial courts grant of mediation sanctions pursuant to MCR 2.403. Neither of these are presented in Conrail's brief.

First, the Court of Appeals reviews de novo a trial court's decision to grant or deny a post-trial motion for mediation sanctions under MCR 2.403. *Cheron v Dow Jones, Inc*, 244 Mich App 212, 218; 625, NW2d 93, 97 (2000). Secondly, and contrary to the position of Appellant, the trial court's award is reversible only for abuse of discretion. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 379, 533; NW2d 373, 386 (1995). That is to say that the evidentiary components of the award, including the permitted costs as well as the concluded dollar amount, is within the trial court's discretion and cannot be upset absent clear abuse.

B. By Submitting to, and Deriving the Benefit of, the Case Evaluation Provided for in MCR 2.403, Conrail is Precluded From Now Challenging its Application.

Michigan Court Rule 2.403, in pertinent part, prescribes "case evaluation," or a form of mediation, for tort cases brought in Michigan Circuit Court. MCR 2.403 (A)(2). Should a party reject the liability assessed by the evaluation, that party "must

pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation."

Rule 2.403 also provides a method by which parties to a lawsuit can opt out of the mediation requirement. MCR 2.403 (C). In case the parties find themselves unaware of the right to opt-out, Michigan case law affirmatively protects them, requiring express assent to the case evaluation. *See, e.g., Toupin v Toupin*, Mich Ct App, *unpublished*, No. 217825 (April 21, 2000).

Conrail failed to object to the use of a case evaluation panel in response to William Frank Ward's claim. To the contrary, it prepared testimony, presented it to the panel, and willingly allowed the panel to evaluate the case. In rejecting that evaluation and exercising its right to a jury trial, Conrail knew, as it always knows, that it ran the risk of mediation sanctions should the jury trial not end as it hoped. Now that exactly such a scenario has unfolded, the trial court correctly awarded costs, as permitted under MCR 2.403.

Conrail's belated attempt to exempt itself from the application of MCR 2.403 cannot be allowed. Equity demands that a party which submits to the case evaluation process without objection, be required to comply with the entire process, not simply those portions from which it derives benefit.

C. Federal Law Does Not Actually Conflict With MCR 2.403, Thus Permitting the Trial Court's Order of Mediation Sanctions In Accordance With the Rule.

The Supremacy Clause of the US Constitution provides that state laws are preempted by federal laws in cases of express preemption, conflict preemption, or field preemption. *US Constitution*, Article 6. While Appellant Conrail has cited none of these in support of its preemption argument, the "substantive law" argument made in its brief appears to invoke "conflict preemption", stating that FELA does not support an award of attorney fees, thereby precluding collection thereof by William Frank Ward. That argument fails.

In the absence of an express congressional command, of which we have none in this case, state law is preempted if the law actually conflicts with federal law. *Cipollone v Liggett Group, Inc,* 505 US 504, 516 (1992). To see whether a true conflict exists, one must analyze both the state rule and the Act violated by Conrail which resulted in Ward's recovery. As described above, MCR 2.403 implores the parties to submit to a case evaluation panel. To the extent a party rejects the panel's findings and exercises its right to a jury trial, but then fails to receive a favorable ruling at the hands of the jury, it becomes liable for the opposing party's costs of bringing the case to trial. The purpose of this rule is to encourage settlement and deter protracted litigation. *Dykes v William Beaumont Hospital*, 246 Mich App 471, 484; 633 NW2d 440, 447 (2000).

The Federal Employer's Liability Act, on the other hand, does not specifically address the issues of settlement or alternative dispute resolution. While Conrail attempts to fill the void of statutory language with case law, that case law fails to create a conflict with the Michigan Rule. Ward is not arguing that he should be paid either costs from the start of litigation or prejudgment interest, as is contemplated by each and every one of Conrail's cases. Nor does Ward agree that, if Conrail had chosen to opt-out of MCR 2.403, he would have an independent right under FELA to collect fees or costs. The Michigan Rule provides a process and incentive for resolution of disputes, and is separate and distinct from the types of awards contemplated by existing FELA case law, presenting no actual conflict.

In the absence of actual conflict, no preemption with MCR 2.403 can exist. *X v Peterson*, 240 Mich App 287, 290; 611 NW2d 566, 567-568 (2000). While Conrail attempts to distinguish this case, it is far too expansive with its holding. As in that case, the trial court had the right to utilize the rules provided by FELA as well as the non-conflicting Michigan Rule. *Id.* By doing so, the trial court correctly granted William Frank Ward's motion to collect mediation sanctions pursuant to MCR 2.403.

D. Michigan Rule 2.403 Does Not Constitute an Infringement to Conrail's Right to a Jury Trial.

Appellant asserts that the imposition of MCR 2.403 infringes upon their

"substantial right" to a trial by jury. Appellant's Brief, p. 49. Michigan case law flatly rejects such an assertion. Use of MCR 2.403 "does not infringe on a party's right to a jury trial, because the rule ensures that a party may obtain a jury determination of disputed issues if the party so chooses." *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 133; 573 NW2d 61, 64 (2000). The Michigan Supreme Court has the power to dictate matters of procedure, such as MCR 2.403, and a party's right to a jury trial does not restrict or conflict with that power. *Id.*

E. The Trial Court's Award of William Frank Ward's Entire Costs Does Not Constitute an Abuse of Discretion.

The Court of Appeals remand to reduce William F. Ward's costs by the amount of paralegal fees is not being challenged by Plaintiff-Appellee.

RELIEF SOUGHT

WHEREFORE, Plaintiff-Appellee prays that this Honorable Court deny the Application for Leave to Appeal.

Respectfully submitted,

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Dated: October 27, 2003